

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CR. No. 15-4265 JCH

MATTHEW DALE SAMPLE,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on *Defendant's Motion to Modify Order* [Doc. 67]. In the motion, Defendant Matthew Dale Sample ("Sample") asks the Court to modify a prior order in order to enable the Tenth Circuit Court of Appeals to remand this case to this district court to consider whether to allow Sample to obtain an approximately \$44,000 loan to pay attorney's fees.

BACKGROUND

On December 1, 2015, Sample pleaded guilty to fraud and wire fraud as charged in the information. Docs. 1, 5, and 6. On March 23, 2017, this Court sentenced Sample to five years of supervised release with various conditions, as well as restitution to the victims in the amount of \$1,086,453.62. Docs. 50, 51, 54. Among the conditions of Sample's supervised release was that he "not incur new credit charges, negotiate or consummate any financial contracts or open additional lines of credit without prior approval of the probation officer." Doc. 54. On June 1, 2017, the United States filed its appeal [Doc. 56] of Sample's sentence to the United States Court of Appeals for the Tenth Circuit, where the case currently resides.

On June 15, 2017, Sample filed his Motion to Modify Judgment [Doc. 59], asking the Court to modify the conditions set forth in its Judgment to permit Sample to obtain a loan for a little over \$44,000 to cover past due and future attorney's fees and expenses. The Government opposed the motion [Doc. 62], and Sample filed a reply [Doc. 64]. On August 1, 2017, the Court denied Sample's Motion to Modify Judgment on the grounds that it lacked jurisdiction to rule upon it. *See* Doc. 66. Thirty days later, on August 31, 2017, Sample filed the Motion to Modify Order that is presently before this Court.

DISCUSSION

Sample requests relief under Rule 37(a) of the Federal Rules of Criminal Procedure, which states:

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

- (1) defer considering the motion;
- (2) deny the motion; or
- (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

Fed. R. Crim. P. 37. Rule 37 has a counterpart in the Federal Rules of Appellate Procedure, which provides:

(a) Notice to the Court of Appeals. If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.

(b) Remand After an Indicative Ruling. If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

Fed. R. App. P. 12.1.

After reviewing Sample's motion, the Court concludes that cannot affirmatively state that it would grant the motion to modify its judgment, nor that the motion raises a substantial issue. Therefore, the Court will not modify its original Order as requested by Sample

IT IS THEREFORE ORDERED that *Defendant's Motion to Modify Order* [Doc. 67] is **DENIED.**



UNITED STATES DISTRICT JUDGE